WILLIAMS GROUP AUSTRALIA V CROCKER AND THE (NON)BINDING NATURE OF ELECTRONIC SIGNATURES

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I INTRODUCTION

Commercial parties rely on the law to provide certainty in their contractual dealings. Signatures are an important aspect of contractual certainty as they help authenticate the document and provide evidence that the signing party agrees to be bound by the terms of the contract.[1] The expansion of e-commerce — whereby transactions are increasingly conducted through electronic media — has given rise to various legal issues. One issue is the extent to which parties can rely on electronic signatures ('e-signatures') where remote signings have become more common than traditional face-to-face signings.[2] This was demonstrated in the recent decision of *Williams Group Australia Pty Ltd v Crocker* ('*Williams*'),[3] where the NSW Court of Appeal ('the Court') refused to enforce a personal guarantee where a company director's e-signature was affixed to the guarantee without the director's knowledge. Although *Williams* also dealt with issues of ratification and estoppel, this note will focus on the implications of the Court's decision on ostensible authority. Specifically, it queries whether the principles of ostensible authority are relevant in the e-commerce age, and calls for amendments to Australia's electronic transactions legislation to overcome issues raised by *Williams*.

II FACTS

Crocker was one of three directors of building company IDH Modular Pty Ltd ('IDH'). In July 2012, Williams Group Australia Pty Ltd ('Williams') entered into an agreement to supply building materials to IDH on credit ('the agreement'). The agreement was accompanied by an all-moneys guarantee ('the guarantee'), where each director of IDH personally guaranteed debts outstanding on the agreement. The agreement and the guarantee were forwarded to Williams by a facsimile transmission, both bearing the e-signatures of the IDH directors. These e-signatures were purportedly witnessed by IDH's administration manager.

The e-signatures were affixed using the HelloFax system, put in place by IDH, which allowed the directors to upload their paper signature onto the HelloFax platform and then apply it electronically to documents. To access this system, each director was given an initial password that could then be changed. However, Crocker never changed his initial password. Accordingly, any person with access to Crocker's initial password could affix Crocker's e-signature to documents.

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1 Electronic Commerce Expert Group, *Electronic Commerce: Building the Legal Framework,* Technical Report (1998).

2 Bruce Whittaker, 'Remote Signings under Australian Law' (2016) 44 *Australian Business Law Review* 229, 229.

3 [2016] NSWCA 265 (22 September 2016).

III LITIGATION HISTORY

In May 2013, IDH had accrued over $880 000 of debt under the agreement. Williams commenced proceedings in the Supreme Court of New South Wales against IDH to enforce the debt, and against the three directors to enforce their personal guarantees.[4] The claim against Crocker was the only substantial proceeding, as IDH was in liquidation and summary judgment was entered against the other directors. Crocker contended that he was not bound by the guarantee because his e-signature had been affixed by an unknown employee of IDH who had access to his HelloFax account. Williams argued that, by not changing his password, Crocker had given this unknown employee actual or ostensible authority to bind Crocker to the guarantee. Alternatively, Williams argued that Crocker subsequently ratified the guarantee or should be estopped from denying that he was bound by the guarantee.

Williams was unsuccessful at first instance. On the point of actual authority, McCallum J held that Crocker never expressly or impliedly gave his authority to any person to affix his e-signature to contracts.[5] Her Honour also held that Crocker's failure to change his password did not amount to the representational conduct required to give rise to ostensible authority.[6] Finally, Crocker did not have the requisite knowledge to subsequently ratify the guarantee.[7] No ruling was made on the estoppel issue because the argument was 'evidently abandoned' by Williams.[8]

IV THE DECISION AND REASONING IN *WILLIAMS*

Williams appealed the decision on three grounds. First, that the primary judge erred in finding that whoever affixed Crocker's signature did not have ostensible authority to do so.[9] Williams argued that the use of the HelloFax system was akin to putting in place an organisational structure within IDH that amounted to a holding out to trade creditors that the e-signatures had been authorised by the directors.[10] Second, that the primary judge erred by setting the knowledge threshold for Crocker's subsequent ratification of the guarantee too high.[11] Williams argued that Crocker did not have to make himself 'aware of the salient features of the contract',[12] but only needed to have 'closed his eyes to the obvious'.[13] Third, that the primary judge erred in not dealing substantially with the estoppel issue.[14] The Court dismissed Williams' appeal in a judgment delivered by Ward JA.[15]

A *Ostensible Authority and Estoppel*

Upon reviewing the relevant authorities, Ward JA explained the test for ostensible authority: there must be a representation from the principal (Crocker) to a third party (Williams) that the agent (whoever affixed Crocker's e-signature) was authorised to contract on the principal's behalf.[16] In applying this to the facts, her Honour drew heavily on *Pacific Carriers*

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4 *Williams Group Australia Pty Ltd v Crocker* [2015] NSWSC 1907 (23 December 2015).
5 Ibid [16]–[18].
6 Ibid [39].
7 Ibid [47].
8 Ibid [12].
9 *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) [36]–[37].
10 Ibid [37].
11 Ibid [73]–[75].
12 *Williams Group Australia Pty Ltd v Crocker* [2015] NSWSC 1907 (23 December 2015) [52].
13 *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) [75].
14 Ibid [141]–[142].
15 Ibid [151]–[153] (Simpson and Payne JJA agreeing).
16 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72; Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146; Pacific Carriers Limited v BNP Paribas (2004) 218 CLR 451.

Limited v BNP Paribas (‘*BNP*’),[17] where BNP Paribas (‘BNP’) was bound by letters of indemnity signed by an employee on the basis of ostensible authority. The key to this finding was BNP’s conduct in creating an organisational structure that armed the employee to deal with letters of indemnity. This acted as a representation to outsiders that the employee had authority to contract on BNP’s behalf.[18]

In finding that there was no ostensible authority, Ward JA distinguished the current facts from *BNP*. It was important that Crocker did not establish the HelloFax system, but simply participated in its use. Therefore, Crocker, as the putative principal, did not create the organisational structure that allowed for his e-signature to be affixed to the guarantee.[19] Interestingly, in obiter her Honour suggested that the outcome may have been different if the proceedings were brought against IDH, who established the HelloFax system.[20] Furthermore, unlike in *BNP*, Crocker did not ‘arm’ any employee of IDH with a document that, if signed, would appear authentic. Her Honour held that Crocker’s failure to change his password, allowing employees of IDH access to his HelloFax account, did not constitute any holding out of authority because it did not involve any representation.[21] As there was no representation from Crocker to Williams, her Honour held that the estoppel ground must also fail.[22]

B *Ratification*

On the issue of ratification, Ward JA stated the correct knowledge threshold as ‘full knowledge of all the material circumstances’.[23] Accordingly, her Honour held there was no error of law, as the primary judge’s articulation — ‘aware of the salient features of the contract’— was merely a different formulation of the same test.[24]

V CRITIQUE

A *Critique of Ward JA’s Decision on Ostensible Authority*

While Ward JA’s decision may be lauded as a strict application of precedent, it raises problems about how the law of ostensible authority will apply in the digital age. Media richness theory suggests that the ‘richness’ of communication between two parties depends on the medium.[25] Understandably, parties have more difficulty conveying and understanding meaning as they move away from ‘rich’ face-to-face media towards electronic media for contractual negotiation and formation.[26] This is because face-to-face media facilitates ‘equivocality reduction’—the parties are able to visually identify one another, provide each other with immediate feedback and clarify issues as they arise. On the other hand, media of ‘low richness’ (such as online negotiations) are less appropriate for resolving equivocal issues as the inability to interpret subjective meaning, such as a representor’s body language or tone of voice, restricts feedback between the parties.[27] This issue manifested itself with

[17] (2004) 218 CLR 451.
[18] Ibid [40]–[44].
[19] *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) [67].
[20] Ibid.
[21] Ibid [69].
[22] Ibid [150].
[23] Ibid [120].
[24] Ibid [124].
[25] R. L. Draft and R. H. Lengel, ‘Organizational Information Requirements, Media Richness and Structural Design’ (1986) 32 *Management Science* 554.
[26] Terri R. Kurtzberg and Charles E. Naquin, ‘Electronic Signatures and Interpersonal Trustworthiness in Online Negotiations’ (2010) 3(1) *Negotiation and Conflict Management Research* 49, 50.
[27] Draft and Lengel, above n 25, 560.

significant consequences in *Williams*, because the electronic form of communication caused Williams problems in identifying and verifying Crocker's e-signature on the guarantee. As noted by Ward JA, these problems faced by Williams were caused by Crocker's omission to change his password, as opposed to a positive representation by Crocker. With e-commerce moving contractual negotiations towards less 'rich' electronic platforms, the focus of ostensible authority on representations will continue to cause problems for commercial parties.

Williams is a clear demonstration that, due to the communication issues inherent in electronic transactions, a party's omissions can be just as important as their representations. Ward JA touched upon this idea by stating 'in an appropriate case, [ostensible authority could] arise out of some omission on [Crocker's] part.'[28] Nonetheless, her Honour declined to extend the law of ostensible authority in this manner. Considering the overall context of the transaction, *Williams* may have been an appropriate case to challenge the traditional view that ostensible authority must arise from a representation. The agreement and the guarantee were not the first transactions of their kind entered into between Williams, IDH and Crocker; an analogous transaction had been entered into by the same electronic means in 2010. Accordingly, there was little reason for Williams to be put on notice or suspect that there were issues of authority with respect to Crocker's e-signature,[29] especially considering that the agreement and guarantee were ordinary transactions in the building supplies industry.[30] In this context, Crocker's omission was as dangerous as a representation as it played on Williams' seemingly reasonable assumption that the parties had an ongoing, electronic, business relationship.

There is authority suggesting that an omission can lead to ostensible authority where the omission was a 'proximate cause of the other party's adopting and acting upon the faith of [an] assumption'.[31] Adopting this reasoning could maintain the relevance of ostensible authority in the electronic age. It would help avoid situations like *Williams,* where a history of valid electronic transactions leads one party into a reasonable, but erroneous, assumption that the current transaction has been properly authorised.

B *The Way Forward — Amending the Electronic Transactions Act*

Ward JA recognised the difficulties in applying the principles of ostensible authority to the electronic signing context. However, her Honour commented that overcoming these difficulties would require the type of reform that is better left to the legislature.[32] Australia already has the *Electronic Transactions Act 1999* (Cth) ('ETA'), which allows for the recognition and enforcement of e-signatures.[33] The purpose of the ETA is to '[promote] business and community confidence in the use of electronic transactions'[34] by ensuring that transactions are not invalid because they take place through electronic means.[35] Yet, as *Williams* demonstrated, the impediments to unauthorised use of signatures that exist in the paper world do not exist to the same extent in the electronic world. Shaw argues that this leaves parties relying on e-signatures more exposed than those relying on 'wet-ink' signatures.[36] Therefore, it appears the ETA requires amending to achieve its stated purpose.

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28 *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) [65].
29 *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451, [35].
30 Ibid [41].
31 *Thompson v Palmer* (1933) 49 CLR 507, 547 (Dixon J).
32 *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) [4].
33 See also related state based legislation, such as the *Electronic Transactions Act 2000* (NSW).
34 *Electronic Transactions Act 1999* (Cth) s 3(c).
35 Ibid s 8(1).
36 Benjamin Shaw, 'Electronic Signatures: How Reliable are They?' (2016) 36(4) *Proctor* 36, 37.

One area for amendment is the 'signature' provision in the ETA.[37] This provision sets a low threshold for relying on e-signatures, which does not necessarily ensure that electronic agreements are binding. For example, the use of a signatory's name in an email, without any separate verification of the signatory's identity, is generally enough to satisfy the ETA s 10.[38] As shown in *Williams,* this leads parties into the error of thinking they have a binding agreement in circumstances where the use of the signatory's e-signature simply appears on an electronic communication. In contrast, the European Union's 'two-tier' e-signature regime differentiates between a 'simple electronic signature' and an 'advanced electronic signature', with the later providing higher probative value in legal proceedings.[39] Importantly, an 'advanced electronic signature' requires that the signature be created using means under the signatory's *sole control*. If this regime were incorporated into the ETA, parties like Williams would know to make further enquiries about how the e-signature was affixed to the document to ensure it could not have been affixed by someone other than the signatory. That is, Williams could enquire whether Crocker had sole control over his HelloFax account. If Williams then established that Crocker did not have sole control over his Hellofax account (as was the case), they would know that they could not rely on Crocker's e-signature as an 'advanced electronic signature'. Furthermore, parties would know that if they do not make such enquiries, they assume the risk that the e-signature is not an 'advanced electronic signature', reducing the likelihood of its enforcement.

Alternatively, the legislature could reverse the onus of proof to provide electronic transactions with more certainty. Currently, ETA s 15 places the onus on recipients of e-signatures to prove they were authorised by the signatory. Further, *Williams* suggests that recipients are not entitled to rely on e-signatures at face value, but must take further steps of verification. This seemingly undermines the validity of each individual e-signature until it is positively affirmed by a court, which holds significant consequences for e-commerce. The Australian position differs from the *UNCITRAL Model Law on Electronic Commerce,* which provides e-signature recipients with an assumption of authority.[40] This assumption operates like the indoor management rule in corporate law, which allows parties transacting with a company to assume that all the internal formalities needed to give the company authority to enter into the transaction have been complied with.[41] An amendment along these lines would both facilitate and restore confidence in electronic transactions.

C *Limitations on the Decision in Williams*

One final, ancillary point is worth addressing. There may be an 'elephant in the room' in the sense that the Court in *Williams* did not deal with the generally suspicious way that personal guarantees for the debt of another are viewed. Even without the e-signature convolution in *Williams*, the validity of third party, personal guarantees are frequently subject to dispute and controversy.[42] Perhaps the contentious status of guarantees was a silent but influential consideration of the Court. This raises the question of how *Williams* will serve as precedent.

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37 *Electronic Transactions Act 1999* (Cth) s 10.

38 See *Claremont 24-7 Pty Ltd v Invox Pty Ltd [No 2]* [2015] WASC 220; *A-G (SA) v Corporations for the City of Adelaide* (2013) 249 CLR 1; *Legal Services Board v Forster* (2010) 29 VR 277; Diccon Loxton, 'Not Worth the Paper They're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms' (Part A) (2017) 91 *Australian Law Journal* 133, 148.

39 Directive 1999/93/EC of the European Parliament and the Council of 13 December 1999 on a Community Framework for Electronic Signatures [1999] OJ L 13/12, art 2.

40 *UNCITRAL, Model Law on Electronic Commerce,* GA Res 51/162, UN GOAR, 85th mtg, UN Doc A/RES/51/162 (16 December 1996) art 13.

41 *Corporations Act 2001* (Cth) s 128. See also Royal British Bank v Turquand (1856) 119 ER 886; Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146.

42 See, eg, *Yerkey v Jones* (1939) 63 CLR 649; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Garcia v National Australia Bank* (1998) 194 CLR 395. See also Murray Brown, 'Undue Confusion Over *Garcia!*' (2009) 3 *Journal of Equity* 72; Janine Pascoe, 'Directors' Responsibilities: Now the Forgotten Factor in *Garcia* Cases' (2003) 15 *Australian Journal of Corporate Law* 246.

Will it be limited to situations involving personal guarantees, or will it apply to e-signatures more generally? The conclusion to be drawn from *Williams* is that legislation is needed to clarify the position of e-signatures. However, the extent of legislative reform will depend on the answer to the above question, which is deferred to future applications of *Williams*.

VI CONCLUSION

According to *Williams,* a signatory must authorise each individual use of their e-signature for an electronic transaction to be binding. This places a heavy onus on parties seeking to rely on e-signatures. As more standard business transactions shift to the electronic world,[43] it appears that issues of authority will continue to undermine certainty in commercial dealings. Adopting a 'two-tier' e-signature regime, or reversing the onus of proof in the ETA could reinstate the reliability of e-signatures.

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43 Loxton, above n 38, 133.